BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY DALE GEISS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,016,934
HALLMARK CARDS INC.	)	
Respondent	)	
AND	)	
	)	
ROYAL & SUN ALLIANCE	)	
Insurance Carrier	)	

ORDER

Claimant appeals the October 26, 2005 Award Nunc Pro Tunc of Administrative Law Judge Brad E. Avery. Claimant was denied benefits for his hearing loss that allegedly occurred as a result of his employment with respondent. The Administrative Law Judge (ALJ) determined that claimant had failed to file a timely written claim pursuant to K.S.A. 44-520a. This matter was placed on summary calendar by the Board following the appellant's request to waive oral argument on the issues presented.

APPEARANCES

Claimant appeared by his attorney, Chris Miller of Lawrence, Kansas. Respondent and its insurance carrier appeared by their attorney, John David Jurcyk of Roeland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award Nunc Pro Tunc of the ALJ.

ISSUES

1. Did the ALJ err in determining that claimant had failed to timely file written claim for the injuries alleged?

2. Is claimant entitled to reasonable and necessary future medical treatment and/or unauthorized medical treatment subject to the statutory maximum for those benefits?

3. What is the nature and extent of claimant's permanent impairment as a result of his work injuries?

4. What is the amount of compensation due claimant for the injuries suffered while employed with respondent?

5. What is the appropriate date of accident in this matter?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award Nunc Pro Tunc of the ALJ should be affirmed.

Claimant alleges accidental injury over a significant period of time during his employment, resulting in substantial hearing loss. Claimant, a 31-year employee with respondent, had suffered hearing loss as early as the mid 1980s.[1] Claimant has undergone numerous audiology examinations over the years of employment with respondent. It is uncontradicted that claimant's work environment was noisy. The records indicate that the noise level exceeded the 85-decibel maximum level set by both OSHA and NIOSH.[2] The significant dispute in this matter centers around the timing of claimant's hearing loss. Respondent argues that claimant began wearing hearing protection in the form of ear plugs in approximately 1994, at which time his hearing loss rate was substantially reduced. Claimant acknowledges he began wearing hearing protection with respondent, but argues that his hearing loss continued even after the introduction of the ear plugs.

Claimant was referred for examination to several medical health care providers who, after reviewing claimant's numerous medical records, made determinations regarding the percentage of claimant's hearing loss, as well as determinations regarding the time frame within which those losses occurred. Claimant was referred by respondent for an evaluation and examination to Gregory A. Ator, M.D., Associate Professor of Otology/Neurotology Division, in the Department of Otolaryngology Head & Neck Surgery at the University of Kansas Medical Center. Dr. Ator, who is board certified by

[1] Bieri Depo. at 24.

[2] Bieri Depo. at 26.

the American Board of Otolaryngology – Head and Neck Surgery, had the opportunity to examine claimant and a substantial amount of medical records associated with claimant's hearing loss. In his March 18, 2003 letter, Dr. Ator states that claimant has had seven hearing tests since 1994, approximately one each year, which indicate that he has had some progression in his hearing loss since that time. However, when testifying at his deposition, Dr. Ator was specifically questioned regarding the time frame within which claimant's hearing loss occurred. He testified that the testing done on claimant, which did involve a gap between the years 1984 to 1996, showed a definite hearing loss pattern during the testing years. However, he was asked specifically whether claimant's hearing loss began to remain relatively constant, coincidental with the time that claimant started wearing hearing protection. Dr. Ator testified that there was a progression of hearing loss that did change. "That sort of projectory medically speaking changed after he started wearing hearing protection."[3] He was then asked whether it is more probably true than not that his current hearing loss is a natural, direct and probable consequence of the injurious levels of noise claimant was exposed to prior to the time he began wearing hearing protection. Dr. Ator responded yes. He went on to state that claimant was experiencing ongoing hearing loss, which appeared to stabilize at around the time claimant claims to have started using hearing protection.[4] This conclusion by Dr. Ator is supported by the August 14, 1996 letter from the Marston Hearing Center to Liz Gonzales, R.N., with respondent. In that letter, L. E. Marston, Ph.D., discusses claimant's longstanding hearing loss, "which deteriorated significantly approximately two years" before the 1996 letter.[5] Claimant also advised Dr. Marston that he was transferred to a low-level noise area since his last evaluation and "he reports no significant changes in his hearing since he transferred."[6]

Claimant was examined at his attorney's request by board certified disability evaluating physician Peter V. Bieri, M.D., on August 25, 2004. Dr. Bieri also found that claimant had suffered accidental injury in the form of significant hearing loss as a result of his employment with respondent. Dr. Bieri testified that hearing loss, once created in an individual, becomes irreversible. He testified claimant's hearing loss was noise related, with the noise exposure primarily coming from claimant's place of employment. There was a dispute raised regarding whether claimant's hunting activities may have contributed

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[3] Ator Depo. at 10.

[4] Ator Depo. at 10-11.

[5] Gerner Depo., Ex. 8.

[6] Gerner Depo., Ex. 8.

to his hearing loss. However, both Dr. Bieri and Dr. Ator indicated that it was doubtful claimant's hearing loss resulted from gunfire activities, as hunting activity hearing losses typically are unilateral, meaning one ear worse than the other. However, claimant's hearing loss was symmetrical, meaning equally significant in both ears.

Dr. Bieri testified that claimant told him that he had been wearing hearing protection for approximately ten years, which would relate back to the 1994 date discussed above. When asked specifically as to when claimant's hearing loss occurred, Dr. Bieri was unable to say within a reasonable degree of medical certainty. He did state that in order to determine when the hearing loss occurred, it would be best to go back through several audiograms and see if a pattern emerged.

When discussing specific audiograms, Dr. Bieri noted the audiograms from 1986 and 1987 showed a definite pattern of loss, which, in his opinion, was not typical of aging and more consistent with noise trauma. He felt that claimant had a clear hearing loss by the late 1980s.

There was also a dispute regarding the type of hearing protection provided claimant. Dr. Bieri stated that the ear plugs which were provided to claimant would not be as effective as ear covers. But he acknowledged that ear covers were so effective that they could actually inhibit a person's ability to participate in conversation. Dr. Bieri also disputed the OSHA and NIOSH ratings, indicating that, in his opinion, any decibel readings above 80 could lead to significant hearing damage. Both OSHA and NIOSH use 85 as the measuring level. However, when asked if claimant's noise exposure exceeded the 80-decibel level he warned against, Dr. Bieri was unable to state within a reasonable degree of medical probability whether, while wearing hearing protection, claimant's exposure exceeded the 80-decibel level which Dr. Bieri utilized as his testing benchmark.

Claimant was not examined by board certified occupational medicine specialist Michael J. Poppa, D.O., but claimant's records were provided to Dr. Poppa for his evaluation and review. Dr. Poppa's records also indicated claimant began wearing hearing protection in approximately 1994. Dr. Poppa discussed the possibility of claimant suffering hearing loss as a result of his hunting activities, but also acknowledged that typically hunting activity hearing loss was unilateral, rather than symmetrical, and he agreed that claimant's hearing loss was symmetrical. Dr. Poppa also testified that, in his opinion, claimant's hearing loss occurred before 1994, when claimant began wearing his hearing protection.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[7]

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[7] K.S.A. 44-501 (Furse 1993) and K.S.A. 44-508(g) (Furse 1993).

K.S.A. 44-520a mandates that written claim be served upon the employer under the Workers Compensation Act within 200 days of the date of accident or within 200 days of the last payment of compensation, whichever is later.[8] However, under certain circumstances, the time period for serving that written claim may be extended to one year. K.S.A. 44-557(a) requires employers to report accidents to the Director of the Division of Workers Compensation within 28 days of receiving knowledge of an accident that wholly or partially incapacitates a worker from working for more than the remainder of the day or shift on which the injuries were sustained. In this instance, an accident report was filed by respondent on August 21, 1996, indicating that claimant was suffering from a hearing loss.

The Kansas Supreme Court has stated that the purpose for written claim is to enable the employer to know about the injury in time to investigate it.[9]

As written claim is the significant issue in this matter and as written claim cannot be determined until a specific date of accident is found, the Board must look to when claimant actually suffered the hearing loss for which he is requesting both medical treatment and permanent benefits.

This record fails to establish precisely when claimant's last unprotected exposure to noise occurred, but it appears to be when he began wearing hearing protection sometime around 1994 to 1996. The effectiveness of that hearing protection cannot be determined from this record. However, the testimony of Dr. Ator and the report from Marston Hearing Center establish that claimant's hearing loss occurred up to the point when he started using the hearing protection. At that point, claimant's hearing loss appeared to stabilize.[10]

The Kansas appellate courts have established a bright line rule for identifying the date of injury in a repetitive, microtrauma situation. While most of the cases involved deal with situations such as carpal tunnel syndrome, hearing loss suffered over a substantial period of time due to daily exposure would qualify under the same analysis. The bright line rule identifies the date of accident as the last day worked.[11]

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[8] K.S.A. 44-520a(a).

[9] *Craig v. Electrolux Corporation*, 212 Kan. 75, 510 P.2d 138 (1973).

[10] Ator Depo. at 10-11.

[11] *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003); *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 945 P.2d 8 (1997).

In *Treaster* and *Durham*, the claimants did not terminate their employment, but accepted accommodated positions that were significantly different than those that caused the microtraumas. The *Treaster* court, in approving *Berry*,[12] stated,

> We do not limit *Berry* to only situations where the claimant could no longer continue his or her employment because of medical conditions. The expected result of *Berry* was for workers to be allowed the latest possible date for their claim period to begin, not for claimants and respondents to try to pick a date of accident or occurrence that best serves their financial purposes.[13]

In this instance, claimant stated he started wearing hearing protection as early as 1994. Likewise, the testimony of Dr. Ator and the medical reports from Marston Hearing Center identify 1994 as the most probable time when claimant began wearing the hearing protection. Pursuant to *Berry* and *Treaster*, this would establish the date of accident as sometime in approximately 1994. This record fails to prove that claimant suffered any work-related noise-exposure hearing loss after he began wearing hearing protection possibly as early as 1994, but certainly no later than 1996. Claimant had 200 days from the date of accident, the last payment of compensation or the respondent's filing of the employer's report of accident, whichever is later, to submit his timely written claim pursuant to K.S.A. 44-520a. In this instance, claimant's written claim was filed on May 18, 2004, substantially beyond the time limits allowed by statute.

Even though respondent did provide claimant medical treatment, including hearing aids in 2003, the providing of medical care, as noted by the ALJ, after the written claim time has elapsed does not revive claimant's right to file written claim.[14]

The ALJ determined that claimant's failure to file timely written claim was dispositive of the claim on a whole and did not address any of the remaining issues raised by the parties. The Board, in reviewing this record and in affirming the ALJ's determination that claimant has failed to file timely written claim, sees no justification in determining the remaining issues presented by the parties.

The Board, therefore, finds that the Award Nunc Pro Tunc of the Administrative Law Judge Brad E. Avery dated October 26, 2005, should be affirmed.

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[12] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[13] *Treaster* at 623.

[14] *Rutledge v. Sandlin*, 181 Kan. 369, 310 P.2d 950 (1957); *Solorio v. Wilson & Co.*, 161 Kan. 518, 169 P.2d 822 (1946).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award Nunc Pro Tunc of Administrative Law Judge Brad E. Avery dated October 26, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Attorney for Claimant
John David Jurcyk, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director